Ex parte Doran (U. S. D. Ct., D. Minn., 1887), 32 Fed. Repr. 76. But it has been recently held by BUTLER, J., in the case of *U. S.* v. *Barnum* (U. S. D. Ct., E. D. Pa., May 24, 1890), that the sending of the notice of a claim in an envelope upon the outside of which was printed "DEAD-BEAT AGENCY," was a violation of the Act of September 26, 1888.

It was stated when the last mentioned Act was reported to the Senate, that an attempt had been made by certain collection agencies to evade the prohibition of the Act of June 18, 1888, by using a transparent envelope, through which their objectionable language, printed in bold characters, could easily be read. To defeat this scheme, the words "or otherwise impressed or apparent," were inserted in the amendatory Act.

JAMES C. SELLERS.

Supreme Court of Wisconsin.

GRANT v. DIEBOLD SAFE AND LOCK CO.

The consideration of a contract between two parties for the benefit of a third party is the consideration for the promise to the third party.

In contracts made between two parties for the benefit of a third person there is the same privity as that between the promisor and the promisee in any case, and such third party may bring action thereon in his own name.

Appeal from the Circuit Court of Ashland County.

Lamoreux & Gleason for appellant.

Dockery & Kingston for respondent.

ORTON, J., May 20, 1890. The plaintiff is the assignee of his partner's interest in the contract and therefore I will speak of him as the contracting party. The plaintiff entered into a written contract with Ashland County to build a county jail, so far as the wood work and masonry were concerned, September 7, 1887, in which it was agreed that the county of Ashland should not be liable in any manner for, or on account of, any damage or delay caused by any other contractor on said building, but the plaintiff should look solely and exclusively to said other contractor for remuneration for any such damage caused by such other contractor's delay or otherwise. The defendant, a foreign corporation, on the same day entered into a written contract with said county to do the iron-work on said building, and in such time as not

in any way to delay the builder of said jail. After so setting out the contracts, the plaintiff avers in his complaint that he was the builder of said jail referred to in said last-mentioned contract, and that the defendant knew of these provisions of the contract with the plaintiff, and knew that he could not look to the county for any delay caused by any other contractor, and that he must look to such other contractor therefor, and that said provision in the defendant's contract was made for the benefit of the plaintiff.

There is an averment in the complaint that the defendant, knowing the provisions of the contracts aforesaid, and in view thereof, promised and agreed with the plaintiff that it would be responsible for any and all damages which might be caused the plaintiff by reason of its delay in constructing the iron-work of said jail according to the provisions of its contract with said county, or otherwise. This last averment would seem to be a general conclusion from the foregoing, and not a part of the written contract, or an independent agreement of the defendant, and so the learned counsel of the respondent treat it in their brief. But the learned counsel of the appellant insist in their brief that such special promise and agreement were actually made by the defendant. At all events, we shall treat the cause of action as depending upon the stipulations of the written contracts. The breach is that the defendant did not construct the iron-work for said jail in the time agreed upon, and thereby greatly delayed and hindered the plaintiff in his part of the work upon said jail, so that the plaintiff was obliged to carry on his part of the work upon said jail at unreasonable times and in small parts, and at great additional costs and expenses, to the plaintiff's damage in the sum of $1,213.10. Judgment is demanded for such amount. This is substantially the complaint. The court sustained a demurrer to the complaint, on the ground that it stated no cause of action, and this appeal is from such order.

From the fact the defendant knew of this peculiar provision of the plaintiff's contract, that he should look to the defend-

ant for any damages for delay caused by the defendant, and not to the county, when it entered into its contract with the county not to delay the plaintiff in his part of the work, the two contracts in these respects should be construed together as having direct relation to each other, if not as one contract. In this way the intention of the parties by these provisions is apparent. The county evidently wished to avoid all liability and litigation on account of delays of the plaintiff by the defendant, and make the defendant directly liable to the plaintiff therefor. If the defendant caused delays of the plaintiff's work by failure to do its work in proper time, the county would be liable to the plaintiff therefor, and the county could hold the defendant responsible therefor. It is therefore provided that the defendant should be directly liable to the plaintiff instead of the county, and the county should be exempt from liability. In this view, if the plaintiff's damages had been liquidated when these stipulations were made, the case would be like *Kimball* v. *Noyes* (1864), 17 Wis. 695, where A. entered into a written contract with B. to pay B.'s debt to C., and it was held that C. could maintain an action against A. in his own name. It is also like *Cook* v. *Barrett* (1862), 15 Wis. 596, where A. owes B., and C. owes A. the same amount, and it was agreed by and between all the parties that B. should release his debt against A., and look to C. alone for payment. It was held a valid contract, and that B. could recover against C. In this case, calling it a legal liability instead of a debt, the plaintiff released the county, and agreed to look to the defendant alone, and the defendant agreed to become responsible to the plaintiff. Why is it not a valid agreement between them all?

But there is another principle equally well established, and that is that a person may recover on an agreement made with another for his special benefit. To illustrate by cases in this court: If one sells chattels to another, and agrees to pay all liens upon them, the persons holding such liens may enforce them against the vendor, because the promise was made for their benefit, although not parties to the agreement: *Kollock* v. *Parcher* (1881), 52 Wis. 393. Where one sells his

land and personal property to another, and the vendee agrees to pay part of the consideration by paying all the debts of the vendor, any holder of any such debt may sue the vendee therefor, and thus avail himself of his promise to the vendor made for his benefit: *Bassett* v. *Hughes* (1877), 43 Wis. 319. Once for all, the principle laid down in this case, and applicable to all like cases, is: "It is settled in this State that when one person, for a valuable consideration, engages with another [by simple contract or by covenant] to do some act for the benefit of a third person, the latter may maintain an action against the former for breach of such engagement:" *Cotterill* v. *Stevens* (1860) 10 Wis. 422; *Putney* v. *Farnham* (1870), 27 Wis. 187; *McDowell* v. *Laev* (1874), 35 Wis. 171; and the cases *supra*, and other cases cited by appellant.

Is this principle applicable to this case? The learned counsel of the respondent contends that it is not, because there is (1) no consideration for the engagement of the defendant not to injure the plaintiff by delays in its iron-work on the jail; and (2) no privity between the parties. In the cases cited above, the consideration in one was the purchase money of the chattels, and in the other the personal property and the land sold; in the first for the vendor to pay the liens, and in the other for the vendee and grantee to pay the debts of the vendor and grantor. In all such cases the consideration of the promise is the same as that for any other stipulation of the contract. The consideration of the contract between the two parties for the benefit of a third party is the consideration for the promise to the third party. The defendant, in consideration of the money it was to receive, agreed to do the iron-work of the jail; and agreed further, for the same consideration, to do it in a particular manner and time, so as not to delay and damage the plaintiff. It was a similar consideration between the plaintiff and the county for the plaintiff's release of the county for the delays of the defendant, and for his promise to look to the defendant alone for his damages on account of such delays. Knowing this, the defendant made its agreement for the plaintiff's benefit, in-

stead of the benefit of the county, in consideration of what it was to receive from the county on its contract. As to the privity of the parties, there is the same privity as that between the promisor and the promisee in any case, and the same privity as in all the above cases. It is by no means certain that the defendant would not be liable to the plaintiff, the other contractor on the job, if it should injure him by unnecessary delays in doing the iron-work, without any direct promise not to do so. In such a case there would be a conjunction of wrong and damage or injury which is the basis of liability, and constitutes a good cause of action. But this is aside from this case. We are clearly satisfied that the complaint states a good cause of action, and is not liable to the demurrer.

The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

No principle of law is better established than that which declares that all contracts not under seal must have a consideration to support them, and that the parties must be in privity with each other. Notwithstanding this, there is perhaps no question which has oftener occupied the attention of the courts than that of consideration and privity of contract, and especially is this so in cases similar to the principal one, wherein the rights of third parties to sue thereon are brought into question.

In the case of an ordinary contract between two persons, for the sale and purchase of an article, very little difficulty arises upon these questions, for, as regards the consideration, it matters not how slight the benefit may be, so long as it is of some value in the eye of the law, provided the transaction be otherwise free from fraud and imposition: *Sprangler* v. *Springer* (1854), 22 Pa. 454; *Pierce* v. *Fuller* (1811), 8 Mass. 223.

When, however, the question arises as to the right of a third person, not a party to the original contract, to sue thereon, difficulties arise and it is by no means an easy matter to distinguish between and define, what cases come within the rule, and what within its exceptions. The rule was not definitely settled in England till the year 1861 when the case of *Tweddle* v. *Atkinson*, 1 B. & S. 393, came before the Court, and Justice WIGHTMAN stated the law to be "now well established that no stranger to the consideration can take advantage of a contract although made for his benefit." In this opinion, Justices CROMPTON and BLACKBURN concurred, the former saying:—"The modern cases have * * overruled the older decisions; they show that the consideration must move from the party entitled to sue upon the contract.

It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage and not a party to it for the purpose of being sued."

There would, however, seem to be an exception to the rule, even in England, in the case of money had and received. Yet the mere fact of A having sent money to B, to be paid by him to C, does not of itself impose such liability upon B to pay it to C as will entitle the latter to sue therefor in his own name; but if there is any assent on B's part, either express or implied, that he will pay or hold the money to C's use, then the action lies: *Lilly* v. *Hays* (1836), 5 A. & E. 548.

Upon this point, however, the authorities in this country differ. Mr. Justice STORY in his work on contracts (§ 552), after stating that the English rule is against the right of a third party, says: "In America, the decisions have been conflicting on the point; but the tendency of the courts is in the same direction." He cites *Exchange Bank* v. *Rice*, *infra*, and *Griffith* v. *Ingledew* (1821), 6 S. & R. (Pa.) 429, in support of his statement. Mr. Parsons is however of the opposite opinion, for he says: "In this country, the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted; and we think it would be safe to consider this a prevailing rule with us; indeed it has been held that such promise is to be deemed made to the third party if adopted by him, though he was not cognizant of it when made." He cites *Lawrence* v. *Fox*, *infra*, and *Steman* v. *Harrison* (1862), 42 Pa. 49, in support of his contention: Par. Contracts, 468. This latter case was decided upon a well-known principle of law, that a promise to accept a bill for a fixed amount is equivalent to an acceptance, not only as to the drawer, but as to every party who takes the bill on the faith of such promise. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill.

Notwithstanding this diversity of opinion among the text-book writers, they all state the general rule upon the right of a person to sue upon a contract to be that the obligation is, under ordinary circumstances, confined to the parties, and cannot be enforced by third persons: Hare, Contracts 193. There must be privity of contract between the plaintiff and the defendant, for, says Justice METCALF in *Mellen Adm'r* v. *Whipple* (1854), 1 Gray (Mass.) 317: "A plaintiff in an action on a simple contract, must be the person from whom the consideration of the contract moved, and * * a stranger to the consideration cannot sue on the contract."

Many cases are to be found upon the subject, but they are not all reconcilable with one another. They all support the rule as laid down in *Mellen* v. *Whipple*, *supra*, but admit of many exceptions thereto. The inconsistency would seem to lie in the action of *assumpsit*, which had its origin in *tort*, upon the ground that one who is injured by another has his action to recover damages, although a stranger, and becomes entitled by acting on the inducement held forth: Hare, Contracts 193.

In the case of an ordinary contract by A with B, for a consideration, to pay B's debt to C, there is

an absolute contract entered into between A and B, but to it C is not an original party, and the question arises, how can C, who is not privy to such contract, sue A upon his promise, made upon a valuable consideration, for the debt owing to him by B? Clearly so far as A and B are concerned, B is relieved from the payment of such debt, and could bring suit against A, if, through his breach, B should be compelled to pay. But where does C's right come in? Does it spring directly from the contract itself? Some cases have gone so far as to hold that such is the case, that the right does spring from the contract, and for this reason, that B in making the contract made it for C if he chose to accede to it, and that all that C has to do is to ratify or assent to it, which he may do by bringing action thereon. Now if such be the case, how does C stand with regard to B? It is a well established principle of law that a party must ratify or assent to the contract as made. He cannot assent to it and yet dissent from its terms. It therefore follows that if A by the contract released, or rather relieved, B from all liability to C, the latter in assenting to such contract releases B from all liability and agrees to look to A wholly.

This theory is contended for in *Warren* v. *Batchelder* (1845), 16 N. H. 580, where the defendant was indebted to one Dow upon a promissory note, and Dow was indebted to the plaintiff, who had brought an action and summoned the defendant as trustee. Dow requested defendant to pay the debt and costs to the plaintiff out of the money due upon the note, which defendant promised to do and paid the balance to Dow, who surrendered the note. Plaintiff afterwards requested defendant to pay him the money, which he refused to do. In an elaborate opinion, wherein he examines the cases upon the question, Justice WOODS says, "The facts before us present a case of money had and received by the defendant to the use of the plaintiff. And provided the plaintiff is so far a party to the arrangement as to be entitled to receive the money, he may, upon the general principle of the cases cited, maintain this action. But if before commencing suit, he was no party to the arrangement, either by an original participation in it or by a subsequent assent to it and adoption of its provisions, he does not stand in such privity with the defendant as to be entitled to maintain the action. But the money having been deposited with the defendant for the purpose of paying the debt which Dow owed to the plaintiff, the assent of the plaintiff to that arrangement, and his acceptance of that provision made for the payment of his demand, whether such assent and acceptance were contemporaneous with the acts of the other parties * * * or subsequent * * must operate to discharge the debt for which it was designed to provide, unless there should be cause for holding that the provision was merely collateral. * * The deposit by a debtor with a third party for the payment of his debt, and the promise of him with whom the money is deposited, to pay the same to the creditor, together with the assent of the creditor to the arrangement, and his acceptance of the provision which is made by it for securing the payment, his claim must be deemed and taken to be discharged and paid, and a new debt and a new

debtor adopted in the place of the old." The case of *Clough* v. *Giles* (1886) 64 N. H. 73, is to the same effect.

Another view of the question has, however, been taken, which looks upon the contract between A and B as imposing a duty upon A to pay B's debt to C, from which the law will imply a promise in favor of C. Here the duty and the promise must be equal to, or correspond with each other. What is the duty imposed on A, and where is the implied promise? The duty is to pay B's debt to C instead of B and so relieve B from all liability, and the implied promise arises between A and C, for if C sues A upon the promise made by A to B, (which is impliedly made with C) he must sue him as liable instead of B and release B.

The case of *Bohanan* v. *Pope* (1856), 42 Me. 93, follows this principle. It was a case in which one Whitney had a contract with the defendant as to the hauling of logs. Plaintiff was employed by Whitney to haul and cut the logs, and not being paid brought an action against the defendant to recover the amount due him. Justice MAY, in delivering the judgment of the Court, proceeded as follows:—"It is undoubtedly true, as a general proposition, that no action can be maintained upon a contract, except by some person who is a party to it. But this rule of law, like most others, has its exceptions; as, for instance, where money has been paid by one party, to a second, for the benefit of a third, in which case the latter may maintain an action against the first for the money. So, too, where a party for a valuable consideration stipulates with another, by simple contract, to pay money or do some other act for the benefit of a third person, the latter, for whose benefit the promise is made, if there be no other objection to his recovery than a want of privity between the parties, may maintain an action for a breach of such engagement." He relied upon the language of Justice BIGELOW, in the opinion of the Court in *Brewer* v. *Dyer* (1851), 7 Cush. (Mass.) 337, which reads thus:—"It [the rule] does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate; nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff, but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded."

In support of the contention that if the third party sues the promisor he thereby releases the person primarily liable; Justice MAY in his opinion in *Bohanan* v. *Pope*, *supra*, says: "While the law does this in favor of a third person, beneficially interested in the contract, it does not confine such person to the remedy which it so provides; he may * * if he choose, disregard it and seek his remedy directly against the party with whom his contract primarily exists. But if he does so, then such party may recover against the party contracting with him, in the same manner as if the stipulation in the contract had been made directly with him and not for the benefit of a third person. The two remedies are not concurrent but elective, and

an election of the latter implies an abandonment of the former." To the same effect, *Todd* v. *Tobey* (1848), 29 Me., 219; *Motley* v. *Manuf. Ins. Co.* (1849), Id. 337. The cases of *Johnson* v. *Collins* (1862), 14 Iowa 63; *Thompson* v. *Bertram* (1863), Id. 476; *Scott's Adm'r* v. *Gill et al.* (1865), 19 Id. 187; *Johnson* v. *Knapp* (1873) 36 Id. 616; *Phillips Adm'r* v. *Van Schaick & Wilcox* (1873), 37 Id. 229; *Roberts* v. *Austin Corbin & Co.* (1868), 26 Id., 315, support this view. The Iowa Code of Civil procedure provides: "SECTION 2543. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section," which relates to actions by trustees, etc.

The case of *National Bank* v. *Grand Lodge* (1878), 98 U. S. 123, was an action brought to compel payment of certain coupons formerly attached to bonds issued by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge adopted a resolution as follows: "*Resolved*, that this Grand Lodge assume the payment of the two hundred thousand dollars bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid." The opinion of the Court was delivered by Justice STRONG, as follows: "The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. * * The holders of the bonds were not parties to it, and there was no privity between them and the Lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. * * No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where under a contract between two persons, assets have come to the promisor's hands, or under his control, which in equity belong to a third person. In such a case, it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another, to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the prom-

isor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."

Cragin v. *Lovell* (1883), 109 U. S. 194, followed the doctrine laid down in *National Bank* v. *Grand Lodge*, *supra*. In this case an action was brought against Cragin, alleging a sale of a plantation by the plaintiff to one Fisk, a portion of the price being paid in cash, and nine notes for the balance payable in successive years, secured by a mortgage of the estate. Plaintiff further alleged that Cragin had paid the first three notes, and that foreclosure proceedings had been taken for a balance due plaintiff on the notes. That subsequently to the purchase by Fisk, Cragin claimed that Fisk was acting merely as agent; that the purchase in his own name was illegal; that the money paid down at the time of sale, and subsequently was Cragin's; and that he had been adjudged, by final decree, to be the legal owner of the estate.

The plaintiff, in support of his right of action against Cragin, relied upon the Louisiana Civil Code of 1870: "ART. 1890. A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked." And also upon the Code of Practice of that State: "ART. 35. An equitable action is that which does not immediately arise from a contract, but from equity in favor of a third person, not a party to it, and for whose benefit certain stipulations have been made; thus, if one stipulated in a contract entered into with another person, and as an express condition of that contract, that this person should pay a certain sum on his account, or give a certain thing to a third person, not a party to the act, that third person has an equitable action against the one who has contracted the obligation, to enforce the execution of the stipulation." Justice GRAY however held that the provisions of the Codes did not apply to the case, saying: "The only allegations touching the relation of Cragin to these notes are, that in a suit by him against Fisk, he alleged that Fisk, in purchasing the land, acted merely as his agent, and that he owned the land and was liable and ready to pay for it. * * If this amounted to a promise to any one, it was not a promise to the plaintiff, nor even a promise to Fisk to pay to the plaintiff the amount of the notes, but it was, at the utmost, a promise to Fisk to pay that amount to him, or to indemnify him in case he should have to pay it."

In *Pope* v. *Porter*, (1887, U. S. Cir. Ct., S. D. Iowa, C. D.), 33 Fed. Repr. 7, the plaintiff was a mortgagee of personal property, sold by the mortgagor to the defendant, who agreed to pay the mortgage debt as part of the purchase money. Here SHIRAS, J., states: "It has long been the settled law in Iowa that an action at law can be maintained upon a promise made by A to B to pay a debt due from B to C, provided a sufficient consideration is shown to exist." The cases of *Bank* v. *Grand Lodge* (1878), 98 U. S. 123, and *Cragin* v. *Lovell* (1883), 109 U. S. 194, *supra*, were relied

upon by counsel for the defendant as supporting the doctrine that, under the facts in the present case, there was no privity of action between the parties. The learned Judge, however, dismissed this contention by showing, that in *Cragin* v. *Lovell*, the facts failed to show an agreement between Cragin and Fisk that the former should pay to the mortgagee the debt due her. He also drew attention to the fact that in the cases cited, "the promise made by defendant was concurrent with and dependent upon the contract of the other party, and, being an executory contract between the intermediate parties thereto, a third party could not sue thereon, without, in effect, changing the meaning of the contract." He cites the opinion of Justice STRONG, in *National Bank* v. *Grand Lodge*, *supra*, as stating the doctrine applicable to the present case and shows that in the case then before the Court the property "belonged in equity to the plaintiffs; that is to say, they were entitled, by virtue of their mortgage, to take possession thereof, to sell the same, and apply the proceeds to the payment of the debt due them. The defendant came into possession of these assets solely through the contract he made with Cheney [the mortgagor], whereby he assumed and promised to pay the debt due plaintiff as part of the purchase price of the corn, and as, by means of this possession thus obtained, he has been enabled to sell the corn, and now holds the proceeds, he is liable to suit on part of plaintiffs."

This view is taken in the case of *Wood* v. *Moriarty* (1887), 15 R. I. 518, which was an action of *assumpsit* brought by plaintiff against the defendant to recover the price of lumber furnished to one Tibbetts for use in the building of defendant's houses. There was a written instrument executed by Tibbetts, transferring and assigning the contract to defendant in consideration of a release from further obligation under it. At the trial, parol evidence was admitted to prove the purchase of the lumber, the execution of the release, and that defendant, besides paying the considerations mentioned, further agreed to pay all bills incurred by Tibbetts on account of the contract. It was contended on the part of the defendant, that the agreement was within the Statute of Frauds, being an agreement, not in writing, to answer for the debt of another. This argument was however met by Chief Justice DURFEE in these words, "An agreement to answer for the debt of another, to come within the Statute of Frauds, must be an agreement with the creditor. A promise by A to B to pay a debt due from B to C is not within the Statute of Frauds * * The contract is absolute * * The course of decision in this State favors the creditor's right to sue, and in principle, we think, recognizes it, though it has not hitherto extended to a purely oral contract." He cites and relies upon *Urquhart* v. *Brayton* (1878), 12 R. I. 169; and *Merriman* v. *Social Manufacturing Co.* (1878), Id. 175, in support of his theory, and remarks,—"Courts that allow the action generally hold that it is not affected by the Statute of Frauds, though, * * they do not unite in the reasons which they give for so holding."

A somewhat different view of this phase of the question has been taken in some of the Courts in this country, holding the contract with-

in the provisions of the Statute of Frauds and therefore void unless in writing. Thus in Connecticut, the Court has decided that a promise made by A to B to pay B's debt to C is within the Statute of Frauds and void unless in writing. This view was taken in *Clapp* v. *Lawton* (1862), 31 Conn. 95, an action of assumpsit, alleging a promise of the defendants to pay a debt due to the plaintiffs from the firm of F. & W., with a general count for money had and received. F. & W. were publishers of a newspaper, and sold out to defendants, Lawton & Wright, and transferred to them their assets, including the debts due to the firm. As part of the consideration, it was claimed that defendants agreed to pay the debts of F. & W., the plaintiff being the principal creditor. The Court, however, held the agreement to be void, so far at least as the plaintiffs were concerned, by the Statute of Frauds," Justice DUTTON remarking, "It would seem that the mere statement of the case would be enough to show that it is within both the letter and spirit of the Statute. The Statute in terms requires written evidence of any agreement whereby to charge, the defendant upon any special promise to answer for the debt, default or miscarriage of another." Further he contended that "the promise offered in evidence was not to the plaintiffs, nor intended for their benefit. It was a mere arrangement for their own purposes, between defendants and F. & W. The consideration did not move from the plaintiffs." These remarks are approved of by Justice BUTLER in *Packer* v. *Benton* (1868), 35 Conn. 343.

The earlier cases in Tennessee are to the same effect; *Campbell* v. *Findley* (1842), 3 Humph. (Tenn.), 330; *McAlister* v. *Marberry* (1844), 4 Id. 426, but the case of *Moore* v. *Stovall* (1879), 2 Lea (Tenn), 543, overrules them and establishes that such a contract is not within the Statute, and that the party for whose benefit it is made may sue thereon. There, one Johnson bought land of the plaintiff and gave as part payment his note, a lien being retained on the face of the deed for the purchase money, Johnson sold to defendant, the consideration being the assumption by defendant of the debt to plaintiffs. Upon a rehearing, Justice FREEMAN delivered the opinion of the Court: "The question turns, so far as the principle involved is concerned, on whether this contract is within the Statute of Frauds, and therefore required not only to be in writing, but signed by the party to be charged, and also made direct to the party suing on it. * * Holding the decisions referred to [*Campbell* v. *Findley*, *supra* and *Erwin* v. *Wagner* (1813), Cook (Tenn.) 400] not to be in accord with sound principle, the only question is, whether they should be overruled or remain simply because they been made. We think they should be overruled and the rule of law established on a sound basis. Several considerations lead us to this conclusion. The question is not one on which rights of property depend, nor will titles be in the least affected by it. It will in our judgment give us a rule on the subject, not only in accord with sound principle, but be in accord with other principles of our law, well settled, on which we habitually act. For instance, it is beyond question that in a court of equity the law has been long settled that where a vender has sold the estate without notice, if the purchase money has

not been paid, the original vendor may proceed against the estate for his lien, or against the purchase money in the hands of the purchaser for satisfaction:' 2 Story Eq. J., §1232. That is the precise case, with the additional fact that here the purchaser has expressly contracted the money shall be paid by him to the original vendor, which makes a much stronger case. The principle in such cases is, that the party has money in his hands which he cannot conscientiously withhold from the other party. This is the law in a court of equity, but why not in a court of law when the action of *assumpsit*, an equitable action in such cases, entitles the party to recover that which he equitably ought to have. * * * * Lastly, it attains the justice of the case, and can do no harm to any one to enforce the solemn contract of a party, based on a valuable consideration, received and enjoyed by him."

The same doctrine is upheld in California, where the Civil Code gives the third party a right of action upon a contract made expressly for his benefit. See Section 1559 of the Civil Code cited with *McLaren* v. *Hutchinson*, *infra*.

The rule in favor of such actions, however, does not apply to the case of a party incidentally benefited by the contract. Thus, in *Chung Kee* v. *Davidson et al.* (1887), 73 Cal. 522, where the defendant Cook executed a deed which, upon its face, purported to be an absolute conveyance of certain property, but was in fact a mortgage to secure certain indebtedness from Cook to the defendants. By a defeasance subsequently executed, it was agreed that Cook should retain possession of, and manage the property, which consisted of mines and turn over to the defendants the entire result of each "clean out" of the "flumes and under-currents of the mines," be applied "to the defraying of the expenses of running and working said mines," and "the payment of all promissory notes, obligations, and accounts of indebtedness of whatsoever nature," due said defendants. While working the mine Cook became indebted to certain Chinamen for labor done and laborers furnished, and gave to the Chinamen a written statement of their indebtedness. These claims were properly transferred to the plaintiff, who brought action for the amount due, alleging that under the terms of the agreement or written contract they were entitled to receive the amount from the defendants and Cook, out of certain "gold-dust," the result of a clear-up. Defendants had paid several amounts, upon Cook's order, had taken a sum on account of money due by Cook, and had also paid another party's account, for work done for Cook. The Court held that the contract was not made expressly for the benefit of the plaintiff's assignors. On the contrary, that it was made expressly for the benefit of the parties named therein; and that the most that could be said was that it was a contract incidentally for the benefit of those who worked in the mine. "It is not necessary, that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract, that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit."

The action was brought under the Civil Code of the State which provides: SEC. 1559. "A contract made expressly for the benefit of a third person, may be enforced by him at anytime before the parties thereto rescind it."

The distinctions taken by the various courts are not all readily reconcilable, yet those stated by Justice SERGEANT in *Blymire* v. *Boistle* (1837), 6 Watts (Pa.) 182, would seem to be the law in Pennsylvania, and to have been generally followed: "If one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee." Quoting the language of Justice HUTTON in *Hadfield* v. *Levis* (1656), Het. 176, he proceeds: "there is a difference where the promise is to perform to one who is not interested in the cause, and when he hath an interest. In the first case, he to whom the promise is made, shall have the action, and not he to whom the promise is to be performed."

As pointed out by Justice WOODWARD, in *Guthrie* v. *Kerr* (1878), 85 Pa. 303: "In the one instance the promisor becomes the custodian and trustee of a fund actually belonging to the beneficiary. In the other, he undertakes to pay some money or do some act in consideration of a benefit conferred on himself." In *Torrens* v. *Campbell* (1874) 74 Pa. 470, Justice MERCUR stated the first branch of the rule to be that where the promisor receives money or personal property to be converted into money, in trust for a third party, the action may be sustained in the name of the latter."

The true reason given for this distinction may be gathered from the opinion of Justice SERGEANT in *Blymire* v. *Boistle supra*, wherein he says, "Where one person contracts with another to pay money to a third, or to deliver over some valuable thing and such third person is thus the only party in interest, he ought to possess the right to release the demand or recover it by action. But when a debt already exists from one person to another, promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity, and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice." The case of *Morrison* v. *Beckey* (1837), 6 Watts (Pa.) 349, supports these views.

In such cases the consideration, to use the words of Justice ROGERS in *Hind* v. *Holdship* (1833), 2 Watts (Pa.) 104, "is sufficient, if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff, with the assent, express or implied, of the defendant; or by reason of any damage, or any suspension or forbearance of the plaintiff's right at law or in equity; or any possibility of loss occasioned to the plaintiff by the promise of

another, although no actual benefit accrues to the party undertaking."

Hostetter v. Hollinger (1888), 117 Pa. 606, was a case in which John S., and Jacob Hostetter each placed a certain sum in the hand of their brother Henry, upon his agreement to contribute a like sum to the fund, the whole to be for the use of Maria Baer since deceased. Maria Baer was not a party to the consideration, and was in some sense a stranger to the contract. "Although she may not even have known of the transaction between the three brothers, yet, if the contract was wholly for her own benefit; if the control of the fund was wholly relinquished by the parties creating it; and Henry Hostetter acted, or assumed to act, as her agent in receiving and holding it, so that the ownership of the fund vested in her, she might maintain an action in her own name when she became informed of the facts. It is well settled in a series of decisions, that he for whose benefit a promise is made, may maintain an action upon it, although no consideration pass from him to the defendant, nor any promise from the defendant, directly to the plaintiff:" CLARK, J., citing *Hind* v. *Holdship* (1833), 2 Watts. (Pa.) 104; *Justice* v. *Tallman* (1878), 86 Pa. 147 where the defendant had promised Wilson for a valuable consideration to pay his debt to the plaintiff, out of property placed in his hands by Wilson, and *Townsend* v. *Long* (1875), 77 Id. 143.

The distinctions, which arise where the contract is for the benefit of the contracting party, and the third party is a stranger to the consideration, are perhaps more fully illustrated by the case of *Kountz* v. *Holthouse* (1878), 85 Pa. 235, where Campbell and Young, being associated as partners, became indebted to Holthouse, and Young, by a written agreement, sold his interest to Kountz; the latter assuming and agreeing to pay Young's indebtedness. Campbell and Kountz continued the business. Holthouse brought action against Kountz and the Court ruled that it would not lie, Justice MERCUR, saying:— "There is nothing in the case before us indicating that the property sold to Kountz was to be delivered over to the defendant in error; nor that it was to be converted into money and the proceeds be paid to him; nor is there any fair inference, * * that the avails and proceeds of the property and business should pay and discharge the debt due to the defendant in error. * * To enable the third person to sustain the action, money or property must have been placed in the hands of the defendant for his use, or he must have become a party to the new agreement." To the same effect are the cases of *Torrens* v. *Campbell* (1874), 74 Pa. 470, and *Blymire* v. *Boistle*, *supra*. The cases of *Torrens* v. *Campbell* and *Kountz* v. *Holthouse* are followed in *Zell's Appeal* (1886), 111 Pa. 537.

The same ruling is followed in *Peacock* v. *Williams* (1887), 98 N. C. 324, where it appeared that the plaintiff had furnished lumber to a contractor, to be used upon certain property owned by one Luke; that his account had not been paid; that the defendant contracted with Luke for a note of $800 to pay off and discharge "all liens and incumbrances *whatever*" upon the said property; that plaintiff had a lien on the property, registered and filed, and that Luke had due notice of the plaintiff's claim before set-

tlement with the contractor. The defendant had stipulated after payment of all bills to surrender to Luke "full and free possession" of the property, "free from all liens and encumbrances." In the opinion of the Court, Chief Justice SMITH said, that "the plaintiff's right of action rested entirely upon the undertaking on the part of Williams * * to surrender the house to the owner of the lot, 'free from all liens and incumbrances whatever.' * * The defendant incurred, under this agreement and from his possession of the note, no personal liability which the plaintiff can enforce in this form of action, *ex contractu*. The agreement is in substance one for the indemnity of the owner of the property against its being subjected to the asserted lien, and is *solely between the parties to it, with whom the plaintiff is not in privity*. * * Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment, but only a note secured from the party by which they might be derived."

In *Alabama*, a somewhat different course has been taken by the Courts, for in *Shotwell* v. *Gilkey* (1858), 31 Ala. 724, Justice WALKER stated the law as follows: "Where one, for a sufficient consideration moving from another indebted to a third person, promises him so indebted to pay his creditor, a failure to comply with the contract gives a right of action, either to the promisee, or to the person for whose benefit the promise was made." See also *Mason* v. *Hall* (1857), 30 Ala. 599. The Civil Code of this State (Id. 1886, p. 577) provides: "2594. Actions on promissory notes, bonds, or other contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not, subject to any defense the payor, obligor, or debtor may have had against the payee, obligee, or creditor, previous to notice of assignment or transfer, except that, in actions upon bills of exchange and promissory notes payable at a bank or banking house, or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title." The meaning of the words, "the party really interested," was considered in *Yerby* v. *Sexton* (1872), 48 Ala. 311, and was thus explained by Chief Justice PECK: "Where the dry legal title is in one, and a clear, equitable title is in another, whether by transfer, delivery, or otherwise, to whom alone the money belongs, and who only is entitled to receive it, and authorized to discharge the debtor,—in such cases, there is no trouble; the action must be brought in the name of the equitable owner. He is * * the party really interested. But where the party having the legal title, is also the only party entitled to receive the money and discharge the debtor, although, when collected, he holds the money, not for his own use but for the use of some other person or persons, and to whose use he is to apply it or to whom he is bound to pay it,—in such cases, the action must be in the name of the party having the legal title."

The Code of Civil procedure of *Arizona* provides: "680. Every action shall be prosecuted in the name of the real party in interest, except as otherwise prescribed."

The Revised Statutes of *Arkansas*, ch. 119, Id. 1884, p. 972, provide: "SEC. 4933. Every action must be prosecuted in the name of the real party in interest, except as provided in Sections 4935, 4936, and 4938."

California Courts sustain the right of the original creditor to bring his action, except in cases of merely incidental benefit: page 604, *supra*.

In *Colorado* such actions are supported, Justice WELLS, in *Lehow* v. *Simonton* (1877), 3 Colo. 346, after quoting numerous decisions *pro* and *con*, saying: "The doctrine of the last [those in favor of the action] quoted, while professedly an anomaly, seems to us the more convenient. It accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions. That it should occasion injustice to either party seems to us impossible." This is also the law in South Carolina, *Thomson* v. *Gordon* (1848), 3 Strobh. (S. C.) 196.

The *Connecticut* courts require the promise to be in writing, in compliance with the provisions of the Statute of Frauds: page 603, *supra*.

In *Dakota* the quesion is provided for by the Civil Code, which provides: "§ 3499. A contract, made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

In *Florida*, the courts uphold the right of a third party to sue on a promise made to another for his benefit. *Hunter* v. *Wilson, Stearly & Co.* (1885), 21 Fla. 250, but there must be a clear intention and purpose upon both the part of the promisor and promisee to benefit such third person directly and primarily: *Wright* v. *Terry* (1887), 23 Fla. 160.

The Code of *Georgia*, (Id. 1882) provides: "§ 2747. If there be a valid consideration for the promise, it matters not from whom it is moved; the promisee may sustain his action, though a stranger to the consideration."

In *Idaho*, the Revised Statutes (Id. 1887, p. 380) provide: "SEC. 3221. A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

In *Illinois*, the distinction between simple contracts and specialties, with reference to this right, is abolished by Section 19, ch. 110 of the Revised Statutes of that State as decided by the case of *Dean* v. *Walker* (1883), 107 Ill. 540, wherein Justice CRAIG, in delivering the opinion of the Court said:—"It is said a third party cannot bring an action in his own name on a contract under seal between third parties * * * but * * the rule of the common law on that subject has been changed by Section 19, chapter 110 of the Revised Statutes of 1874, page 776, so that now it is immaterial, for the purpose of bringing the suit, whether the contract is under seal or not." The section referred to reads as follows:—"19. Any deed, bond, note, covenant or other instrument under seal (except penal bonds) may be sued and declared upon or set off as heretofore, or in any form of action in which such instrument might have been sued and declared upon or set off if it had not been under seal, and demands upon simple contracts may be set-off against demands upon sealed instru-

ments, judgments or decrees (Rev. Stat. ed. 1889, p. 1013).

In *Hume* v. *Brower et al.* (1887), 25 Ill. App. 130; PLEASANTS, P. J., said:—"It has long been settled that a third party may sue on a simple contract entered into by others for his benefit, and upon such an agreement to pay all the debts of one party any creditor of such party may maintain an action." He cited *Shober* v. *Kerting* (1883), 107 Ill. 344; and *Snell* v. *Ives* (1877), 85 Id. 279 in support of his opinion, and followed *Dean* v. *Walker* (1883). 107 Ill. 540.

The *Indiana* courts uphold the original creditor's action if there is a sufficient consideration.

In *Carnahan* v. *Tousey* (1884), 93 Ind. 561, Justice *Woods* states the law as follows: "In an action upon a contract at law, strictly, privity of contract is essential to the right of action, but the rule in equity is different, and by a long line of decisions * * this court has held that a promise of one person to another for the benefit of a third may be enforced in an action brought by the latter in his own name." To the same effect, *Rodenbarger* v. *Bramblett* (1881), 78 Id. 213. In *Worley* v. *Sipe* (1887), 111 Ind. 238, the action was brought by a married woman against the defendant to recover a sum of money which she alleged he had promised to pay her. It appeared that her husband was the owner of land, and sold the same to the defendant, the consideration being a promise on his part to pay a certain sum of money to the plaintiff. Chief Justice ZOLLARS held that there was a sufficient consideration for the promise, namely, the release by the plaintiff of her inchoate interest.

The *Iowa* courts also allow the original creditor to sue but put him to an election, so that a suit against the new promisor releases the original debtor: *supra*, page 600.

In *Kansas*, the rule may be taken as well settled, that third parties not privy to a contract, nor to its consideration, may sue upon it to enforce any stipulation made for their benefit: *Anthony* v. *Herman* (1875), 14 Kans. 494; *Strong* v. *Marcy* (1885), 33 Id. 109; *Brenner* v. *Luth* (1882), 28 Id. 583; *Life Assurance Society* v. *Welch* (1881), 26 Id. 362. The principles governing these cases are well put by Justice VALENTINE, in *Burton* v. *Larkin* (1887) 36 Kan. 246, quoting the case of *Simon* v. *Brown* (1877), 66 N. Y. 355, where the following language is used: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited, We think this a correct statement of the law * * Of course the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed he may be one of a class of persons, if the class is sufficiently described or designated. In any case where the person to be benefited is in any manner sufficiently described or designated, he may sue upon the contract."

These views are supported by the case of *The Plano Manufacturing Co.* v. *Burrows* (1888), 40 Kans. 361; and the very recent one of *Mumper* v. *Kelley* decided March 8, 1890 (Sup. Ct. Kans).

The Civil Code of *Kentucky* provides—"§ 18. Every action must be prosecuted in the name of the real party in interest, except as provided in Section 21."

"§ 21. A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

In *Allen* v. *Thomas* (1860), 3 Met. (Ky.) 198 the Court upheld the doctrine (that the creditor might sue), as "well settled." The case of *Smith* v. *Smith* (1869), 3 Bush. (Ky.) 625 also supports the rule: there the court relied upon the above section, and held that section 33, (Revised Code, 1888, § 21) did "not take the right from the real party in interest to bring the suit in his own name."

In *Louisiana*, the cases of *The N. O. St. Joseph's Association* v. *Magnier* (1861), 16 La. Ann. 338, and *Ferguson's Succession* (1863), 17 Id. 255; and the Civil Code of 1870, Art. 1890, and the Code of practice, Art. 35, *supra*, page 601, support the right of a third party to sue upon the contract.

The *Maine* courts proceed upon the ground of an implied promise and a consequent release of the original debtor: page 599, *supra*.

In *Maryland*, the case of *Coates & Brother* v. *The Penn. Fire Ins. Co. of Philadelphia* (1882), 58 Md. 172, supports the right of the third party to bring action upon the promise made for his benefit.

In *Massachusetts*, the earlier cases would seem to lead to the conclusion that the rule of law in that State was that such actions could be maintained, for in *Hall* v. *Marston* (1822), 17 Mass. 575, Chief Justice PARKER said: "It seems to have been well settled heretofore that if A promises B for a valuable consideration, to pay C, the latter may maintain *assumpsit* for the money. * * The principle of this doctrine is reasonable and consistent with the character of the action of *assumpsit* for money had and received. There are many cases in which that action is supported without any privity between the parties other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise." And Justice BIGELOW, in *Brewer* v. *Dyer* (1852), 7 Cush. (Mass.) 337, added that, "it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, nor upon the reason that the defendant by entering into such an agreement, has impliedly made himself the agent of the plaintiff, * * but upon the broader and more satisfactory basis, that the law operating on the act of the parties, creates the duty, establishes a privity and implies the promise and obligation, on which the action is founded." The opinion of Chief Justice SHAW, in *Carnegie* v. *Morrison* (1841), 2 Met. (Mass.) 381, also supports this view.

The opinions delivered in the the more recent cases in that State would, however, seem to be against the right of a third party to sue upon a contract made for his benefit, for in the case of *Exchange Bank of St. Louis* v. *Rice* (1871), 107 Mass. 37, Justice GRAY defines the law thus: "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it." He further adds that: "The unguarded expressions of Chief Justice SHAW in *Carnegie* v. *Morrison* and of Mr. Justice BIGELOW in *Brewer* v. *Dyer*, *supra*, to the contrary, * * were afterwards * * * qualified, the limits of the doctrine defined and a disinclination repeatedly expressed to admit new exceptions to the general rule, in * * *Mellen* v. *Whipple* (1854), 1 Gray (Mass.) 317; *Millard* v. *Baldwin* (1855), 3 Id., 484; *Field* v. *Crawford* (1856), 6 Id. 116; and *Dow* v. *Clark* (1856), 7 Id. 198. Those judgments have since been treated as settling the law of Massachusetts upon this subject." He further referred to *Colburn* v. *Phillips* (1859), 13 Gray (Mass.) 64; and *Flint* v. *Pierce* (1868), 99 Mass. 68. Although Justice GRAY laid down the law as above, yet he did not overrule the exceptions stated by Justice METCALF in *Mellen* v. *Whipple*, *supra*, that, "Indebitatus assumpsit for money had and received can be maintained, in various instances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind, a recovery has been had where the promise was to a third person for the benefit of the plaintiff; such action being an equitable one that can be supported by showing that the defendant has in his hands money, which, in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant. * * * Cases where promises have been made to a father or uncle for the benefit of a child or nephew form a second class in which the person for whose benefit the promise was made has maintained an action for the breach of it. The nearness of the relation between the promisee and he for whose benefit the promise was made has been sometimes assigned as a reason for those decisions." 3. [Cases falling within the decision in *Brewer* v. *Dyer* (1851), 5 Cush. (Mass.) 337,] "where the defendant had the use and occupation of land of the plaintiff, * * under a promise, or under a legal liability to pay rent for it."

The case of *Felton* v. *Dickinson* (1813), 10 Mass. 287, where a promise was made to the father for the benefit of his son when he should attain his majority, supports the second exception. The Court took the view that "although the father contracted for the son, yet he had a view to the son's advantage, and not his own," and therefore held the son entitled to recover in his own name.

The principles set forth in *Ex-*

change Bank of St. Louis v. *Rice*, *supra*, are followed in *Carr* v. *National Security Bank* (1871), 107 Mass. 43, wherein the defendants were a banking corporation, and the firm of Lincoln and Company had been accustomed to deposit money therein, and draw their checks upon the same. Lincoln and Company, in consideration of $600 paid to them by plaintiff, drew their check upon the defendants for the like sum, payable to the plaintiff's order, and the plaintiff duly presented the check and demanded payment which was refused, although the defendants had funds in hand, against which the firm were entitled to draw to a greater amount. Justice GRAY here points out, that here there was no trust or position of principal and agent established. "The relation between the defendants and the drawer, as disclosed in the declaration, was simply the ordinary one of banker and customer, which is a relation of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*. * * The money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to the depositor to pay an equivalent sum upon his demand, or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the holders of his checks. * * * and the banker's promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter, by accepting the check when presented, or otherwise." The question of the right of the payee of a check does not, however, fall within the purposes of this annotation which is confined as far as possible to the question involved in the principal case, namely, the right of a third person to sue upon a contract made for his benefit, and must therefore be reserved for future consideration. The still more recent case of *Morrill* v. *Lane* (1883), 136 Mass., 93, is to the same effect. There the Court held "that a promise made by A to B that A will pay unspecified amounts of money to various persons not named, but described generally as of a certain class, will not support an action by one of those persons against A," no trust arising from such a promise. See further, as upholding the Massachusetts doctrine, *Rogers* v. *Union Stone Co.* (1881), 130 Mass. 581; *Prentice* v. *Brimhall* (1877), 123 Id. 291; and *Gamwell* v. *Pomery* (1876), 121 Id. 207.

The *Michigan* cases would seem to follow the English rule as it exists at the present time. Thus in *Pipp et al.* v. *Reynolds et al.* (1870), 20 Mich. 88, it appeared that upon a consideration moving from one Ecklin, the defendants promised to perform a job of painting for the plaintiff, which Ecklin had previously agreed with the plaintiffs to do for them. It was not stated to whom this promise of the defendant was made, but, generally that by means of the premises, promises and undertakings set forth in the declaration, the defendants became liable to pay to the plaintiffs the money thereby sought to be recovered. The Court held that—

"though as between Ecklin and the plaintiffs, the former is stated to have undertaken to perform the work, and as between defendants and Ecklin, the defendants are alleged to have promised to carry out that agreement, and thus making the performance of Ecklin's part of the first agreement one of the objects of the second agreement, yet no contract relation between the parties to this suit in respect to the last agreement, is shown, which could entitle the plaintiffs to recover damages for its violation by defendants."

The case of *Turner* v. *McCarty* (1871), 22 Mich. 264, was an action of *assumpsit* for work and labor done and performed by plaintiff for the contractor for street paving, the defendant being the assignee of the original contractor with the city, and by the terms of the assignment to him had agreed with the assignor to pay all sums of money due to persons for such labor as had been performed by the plaintiff. Chief Justice CAMPBELL declared the case "directly within the principle of *Pipp* v. *Reynolds*," *supra*. These cases are further supported by *Halsted* v. *Francis* (1875), 31 Mich., 112, where plaintiff (Francis) declared that he being the owner of a note executed by one Rice, the defendant Halsted, in consideration of the sale and delivery by Rice to defendant of a horse, harness and buggy, undertook and promised Rice to pay the note to plaintiff (Francis) and take up the same at maturity. The Court held "The only contract alleged and proved was a contract between the defendant and Rice, to pay the note of the latter to the plaintiff, who was no party to that contract, who gave no consideration for, and was in no way bound by it. The only consideration paid was paid by Rice, and he was the only party to be injured by the breach of the contract. The plaintiff still retains the note and Rice's liability upon it." These decisions follow *Brown* v. *Hazen* (1863), 11 Mich. 219, and are distinguished from *Osborn* v. *Osborn* (1877), 36 Mich. 47, in which the plaintiff was a creditor of the firm of Osborn, F. & Co., composed of the defendants O., D. & F. and held their note for the debt. F sold out to T who agreed to assume F's share of the partnership liabilities. The new partnership paid interest on the plaintiff's claim until dissolution, when the plaintiff sued the new firm upon the common counts, and also specially on the assumption by the new firm of the old firm's debt to her, and the promise to pay it. The circuit judge thought the action came within those cases already noticed, but Chief Justice COOLEY, drew a distinction, saying:—"In each of those cases, the plaintiff counted on a promise made to a third person, not to himself. In this case, the plaintiff counts upon a promise made to herself. * * There is certainly evidence that the plaintiff accepted the new firm as her debtor in place of the old, and that she did not expect to hold F. liable further.

In *Minnesota*, a stranger to a contract and to its consideration, may maintain an action to enforce stipulations in it made for his benefit. Thus, in *Jordan* v. *White* (1882), 20 Minn. 91, Justice BERRY follows the ruling in *Sanders* v. *Clason* (1868), 13 Minn. 379. In that case, N. B. & C. L. Clason, being indebted to Sanders & Co., sold and delivered to M. B. Clason their stock in trade upon the consideration,

in part, of his (M. B. Clason's) promise to pay their indebtedness to Sanders & Co.; Justice McMillan, after remarking the great differences in the opinions both in England and in the United States, and citing *Farley* v. *Cleveland*, *Lawrence* v. *Fox*, *infra*, and the words of Mr. *Parsons* in his work on Contracts (*ante*) says,—"Under these circumstances, in view of the authorities, we are of opinion that the plaintiffs can maintain this action, and that the complainant as to this promise states facts sufficient to constitute a cause of action."

In *Mississippi*, the courts uphold the right of a third party to sue, especially when the contract is "adopted by him, or where he has * * a beneficial concern and interest in the transaction:" *Sweatman* v. *Parker* (1873), 49 Miss. 19; *Bonner* v. *Marx* (1875), 51. Id. 141.

The same is the law in *Missouri*. In *Rogers* v. *Gosnell* (1875), 58 Mo. 589, Justice Wagner says,—"It is now the prevailing doctrine, that an action lies on the promise made by a defendant upon a valid consideration to a third person for the benefit of a plaintiff, although the plaintiff was not privy to the consideration." He cites *Meyer* v. *Lowell* (1869), 44 Mo. 328; *Rogers and Peak* v. *Gosnell* (1873), 51 Id. 466; and *Lawrence* v. *Fox*, *infra*, in support of his opinion. See also *Schuster* v. *Kas. City, St. Jo. & Council Bluffs RR. Co.* (1875), 60 Id. 290; *Mosman* v. *Bender* (1883), 80 Id. 579. From the case of *Rogers et al.* v. *Gosnell* (1873), 51 Mo. 466, it would seem that either party might maintain the action, for "the courts have repeatedly held, that a person for whose benefit a contract is made, may sue in his own name, when it appears on the face of the contract that he is the beneficiary. This was the law before our code of practice was adopted, and that Code allowing a trustee to sue, has not altered this rule." The provision of the Code referred to provide: "Sec. 1990. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract." And Sec. 1991. "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

The Code of Civil Procedure of *Montana* (Comp. Stats. Id. 1887, pp. 60, 61) provides: "Sec. 4. Every action shall be prosecuted in the name of the real party in interest; except as otherwise provided in this act." And "Sec. 6. An executor or administrator, or trustee of an express trust or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

In *Nebraska*, the courts have followed the rule as laid down in the principal case and the cases cited therein, *Shamp* v. *Meyer* (1886), 20

Neb. 223, Chief Justice MAXWELL saying that, "where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise though the consideration does not move from him. This, we think, is a correct statement of the law, and it is decisive of this case." The Code of Civil procedure of that State provides: "SEC. 29. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section Thirty-two. The section referred to relates to actions by trustees and others standing in a fiduciary position.

In *Nevada*, such actions are allowed even, it would seem, independently of the Statute in that State, for in *Miliani* v. *Tognini* (1885), 19 Nev. 133, Justice LEONARD observes:—"Besides the statute which provides that every action shall be prosecuted in the name of the real party in interest, this Court has held, in three different cases, that the beneficiary named in such a contract may maintain an action thereon in his own name." The cases referred to are *Ruhling* v. *Hackett* (1865), 1 Nev. 360; *Alcalda* v. *Morales* (1867), 3 Id. 132; and *Bishop* v. *Stewart* (1878), 13 Id. 25. The Statute referred to in the above case (Gen. Stat. ed. 1885, p. 755) provides:—"3026. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this Act."

The courts of *New Hampshire* require the original creditor to be a party to the arrangement, or to subsequently adopt and assent to it; substantially, they insist upon a novation, a topic not within the scope of this article. (See page 598, *supra*.)

The Courts of *New Jersey* hold that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. They admit there is a class of cases in which a person performing service or doing work under a contract may be held in damages for injuries to third persons, occasioned by negligence or misconduct connected with the execution of the contract, these being cases where the duty or liability arises independent of the contract: *Marvin Safe Co.* v. *Ward* (1884), 17 Vr. (46 N. J. Law), 19. The case of *Crowell* v. *Currier* (1876), 12 C. E. Green (27 N. J. Eq.) 152, would, however, seem to establish the rule, in favor of such actions on simple contracts, "as settled, in this State, for the present. But it has never been understood to apply to contracts under seal:" Vice Chancellor who also referred to *Joslin* v. *N. J. Car Spring Co.* (1873), 7 Vr. (36 N. J. Law) 141, wherein the Court held such actions maintainable.

The Code of Civil procedure in *New Mexico* provides: "§1882. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section."

The theory deducible from the *New York* decisions would seem to be this: that in order to give an action to a third party, who may derive a benefit from the performance of the promise, there must be, *first*, an intent by the promisee to secure some benefit to the third party, and, *second*, some privity between the promisee and the party to be benefited, and some obligation or duty arising from the former to the latter which would give him a legal or equitable claim to the bene-

fit of the promise, or an equivalent from him personally. A legal obligation or duty of the promisee to the beneficiary will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise; the obligation of the promisee furnishes an evidence of the intent of promisee to benefit the third party, and creates a privity by substitution with the promisor. A mere stranger cannot intervene; there must be a new consideration or some prior right or claim against one of the contracting parties.

In *Farley* v. *Cleveland* (1825), 4 Cowen (N. Y.) 432; affirmed (1827), 9 Id. 639, Farley sued Cleveland, declaring specially, that one Moon had given the plaintiff a promissory note; that Cleveland, in consideration of fifteen tons of hay sold and delivered by Moon to him, at his instance, had promised to pay the note of Moon to Farley. The Court held that "in all these cases founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery."

The principle declared in this case was followed in *Lawrence* v. *Fox* (1859), 20 N. Y. 268, where one Holly loaned to the defendant $300, stating at the time that he owed that sum to the plaintiff and had agreed to pay it to him the then next day; the defendant, at the time of receiving the money, promised to pay it to the plaintiff. A nonsuit was moved for on three grounds, viz: That there was no proof tending to show that Holly was indebted to the plaintiff, that the agreement by the defendant with Holly to pay plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. Justice H. GRAY refused the non-suit, and said that *Farley* v. *Cleveland*, *supra*, "had never been doubted as sound authority for the principle upheld by it," and "put to rest the objection that the defendant's promise was void for want of consideration."

The argument from want of privity was met by Justice GRAY in the following language:—"I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. * * The duty of the Trustee to pay the *cestui que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case, the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of duty imposed in the one case may be visited, and justly, with more serious consequences than in the other by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) 'that [when] a promise [is] made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach, has been applied, to trust cases, not because it was ex-

clusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases."

While this was the opinion of Justice GRAY, Chief Justice JOHNSON, and his associates, DENIO, SELDEN, ALLEN and STRONG, were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

Justice COMSTOCK delivered a dissenting opinion, wherein he strongly upholds the principles of *Tweddle* v. *Atkinson*, *supra*, as follows: "The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking." He contended that *Mellen* v. *Whipple*, *supra*, was a trust case, wherein the defendant had money in his hands belonging to a trust fund, which was the foundation of the duty or promise in which the suit is brought, and that such cases were not authorities for the doctrine in question and did not sustain it.

In *Vrooman* v. *Turner* (1877), 69 N. Y. 280, the action was to foreclose a mortgage on premises which came through several *mesne* conveyances to one Sanborn. In none of these did the grantee assume to pay the mortgage, but when Sanborn conveyed to Turner the deed contained a clause stating that the conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof." The case was distinguished from *Lawrence* v. *Fox*, *supra*, the Court saying: "The rule which exempts the grantee of mortgaged premises, subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or in equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor. * * To give a third party who may derive a benefit from the performance of the promise, an action, there must be, *first*, an intent by the promisee to secure some benefit to the third party, and *second*, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. * * A legal obligation or duty of the promisee to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishes an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene,

and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement."

The more recent case of *Todd* v. *Weber* (1884), 95 N. Y. 181, takes the doctrine as well settled that the right of a third party to maintain *assumpsit* on a promise, not under seal, made to another for his benefit, as now the prevailing rule in this country.

A case has very recently been brought before the Court of Appeals of New York in which the sufficiency of consideration was again raised. From the facts it would appear that the defendant was the executor of one Wright, and that the testator's brother, who was his heir at law and next of kin, contested the probate. A compromise was made between the executor (the defendant in the present action) and the brother of the testator, that the objection should be withdrawn in consideration of the defendant's paying the plaintiff in the present action, a certain sum. The agreement was reduced into writing and read as follows: "For value received, I hereby promise to pay to Saint Mark's Church, New Castle, Westchester County, the sum of five hundred dollars. It is understood that said Church will appropriate the interest of said money to the improvement, adornment, and care-taking of the churchyard of said church: but the payment thereof shall not be exacted till the decease of Thomas Wright [the brother]. It is further understood that upon the execution and delivery, by the residuary legatees named in the will of Lewis Wright [the testator], of a written agreement or of a sufficient promise to bind them, instead of the undersigned, to the above, then this writing shall be destroyed, or delivered to the undersigned, Chas. G. Teed." After giving the definition of consideration as in *Currie* v. *Misa* (1875), L. R., 10 Ex. 162, as follows: "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forebearance, detriment, loss or responsibility, given, suffered, or undertaken by the other," the Court proceeds: "It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is, in a legal sense, injured. The injury may consist of a compromise of a disputed claim, or forbearance to exercise a legal right; the alteration in position being regarded as a detriment that forms a consideration, independent of the actual value of the right forborne. * * As recently held by this Court, [*Todd* v. *Weber*, *supra*,] after a careful review of the authorities, a party for whose benefit a promise is made, may sue in *assumpsit* thereon even if the consideration thereof arose between the promisor and a third person." *Rector etc. of St. Mark's Church* v. *Teed*, Ct. of Appl., N. Y., June 24, 1890.

In *North Carolina*, the courts uphold the doctrine, it would seem, only, upon the ground of money had and received to the plaintiff's use: *Draughan* v. *Bunting* (1848), 9 Ired. (N. C.) 10; *Hall* v. *Robinson* (1847), 8 Id. 56; and the more recent case of *Peacock* v. *Williams*, *supra*, pages 606-7, while noticing

the want of privity, confirms the above.

The *Ohio* courts recognize this right of action in the original creditor. In *Trimble* v. *Strother* (1874), 25 Ohio St. 378, Justice WHITE, said "We do not question the former rulings of this Court, that a party may maintain an action on a promise made for his benefit, although the consideration moved from another, to whom the promise was made. But this rule must be understood and applied with its proper qualifications." He cited *Bagaley* v. *Waters* (1857), 7 Ohio St. 359; *Miller & Co.* v. *Florer* (1864), 15 Ohio St. 151; *Brewer* v. *Dyer* and *Millen* v. *Whipple*, *supra*, and *Thompson* v. *Thompson* (1854), 4 Ohio St. 333, wherein Chief Justice THURMAN says:—"It is well settled that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action at law on that promise."

The *Oregon* Code of Civil Procedure provides: "§ 27. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in Section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." And § 29: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section." Hence, a person for whose benefit a promise is made being the party beneficially interested, the real party in interest, may bring suit thereon in his own name: *Holladay* v. *Davis* (1873), 5 Or. 43; *Baker & Smith* v. *Eglin* (1883), 11 Id. 333; even though the contract be under seal: *Hughes* v. *Oregon Railway and Nav. Co.* (1884), 11 Id. 437; *Schneider* v. *White* (1885), 12 Id. 503.

The *Pennsylvania* cases show the rule in that State to be, that where A promises B to pay B's debt to C out of funds placed in his hands by B, the case does not fall within the statute of Frauds, and therefore "the promise is not simply to pay the debt of another, but to hand over funds appropriated by the debtor himself to the creditor for whose use he deposits them. In such case, the creditor, though not present, is the party to be benefited, and becomes the owner of the fund thus impressed with a trust for him and can sue for it:" *Justice* v. *Tallman* (1878), 86 Pa. 147. Chief Justice MERCUR, in *Townsend* v. *Long* (1875), 77 Pa. 143, thus states the law upon this point: "Where there is a transfer of a fund to the promisor, for the payment of the debt * * he is liable to the creditor on his verbal promise made to the owner of the fund; or if property charged with the payment of the debt be transferred to him, on his promise to the vendor to pay the debt, he is liable to an action by the creditor." In other cases it would seem, that in order to entitle the third party to sue upon the contract, he must have become a party to, or adopted, the new agreement: *supra*, pages 605–6.

The *Rhode Island* courts hold that the contract is not within the statute of Frauds, and generally uphold the third party's right to sue: *supra*, page 602.

The Code of Civil Procedure of *South Carolina* provides: "SECTION 132. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in SECTION 134; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision." And the case of *Brown* v. *O'Brien* (1845), 1 Rich. (S. C.) 268, supports the third party's right to sue. *Thompson* v. *Gordon* (1848), 3 Strobh. (S. C.) 196.

The *Tennessee* courts support the right upon the equitable doctrine that allows an original vendor to proceed either against the estate, or against the purchase money in the hands of the sub-purchaser. It looks upon the action of *assumpsit* in such cases as being an equitable one, entitling the party to recover that which he equitably ought to have: *supra*, pages 603–4.

The *Texas* courts uphold the doctrine that if a party received money from A to pay to B, the latter may maintain a suit against him for it. And if one, for sufficient consideration, undertake to pay a debt due to another by a third party, such undertaking is not within the statute of Frauds: *Monroe* v. *Buchanan* (1863), 27 Tex. 247. The real party in interest must sue: *Thompson* v. *Cartwright* (1846), 1 Tex. 87.

The compiled laws of *Utah* (ed. 1876, p. 492) provide: "SECTION 4. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act."

The *Vermont* courts hold that if A receives property from B to convert into money, under a promise to pay the debt due from B to C, and converts such property into money, C may sue in his own name for his debt; but where the contract is special, or to the extent that it is special, it can only be sued in the name of the party with whom it is made, and from whom the consideration moves: that after the money is realized it becomes absolutely the money of the plaintiff in the defendant's hands, and the law implies a promise directly from A to C: *Phelps, Dodge & Co.* v. *Conant & Co.* (1858), 30 Vt. 277; *Crampton* v. *Ballard* (1838), 10 Id. 251.

The Code of Civil Procedure of *Washington* provides: "SECTION 4. Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

In *West Virginia*, Chap. 71 of the code provides: "2. An immediate estate or interest in, or the benefit of a condition respecting any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made, for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or

promise." *Johnson* v. *McClung* (1885), 26 W. Va. 659, shows the effect of this section to be not to divest rights, but to afford remedies to parties not allowed by technical rules of pleading at common law, and interprets the section as reading thus: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise is made for the sole benefit of a person) with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."

The Revised Statutes of *Wisconsin* (ed. 1889, p. 1482) provide: "SECTION 2605. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section two thousand six hundred and seven; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of the contract."

The Revised Statutes of *Wyoming* (ed. 1887, page 558) provide: "SECTION 2382. An action must be prosecuted in the name of the real party in interest, except as provided in the next two following sections; but when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim and defense, as allowed by law, shall not be impaired." The sections referred apply to actions on bonds and by executors, officers, trustees and so forth.

In conclusion, the right of a third party to sue upon a contract made with another for his benefit, is upheld by the Supreme Court of the United States in cases where assets have come to the promisor's hands, or under his control, which in equity belong to such third party, and that upon the ground of an implied promise, and also in cases where the plaintiff is the beneficiary solely interested in the promise: *supra*, pages 600–1, and *Hendrick* v. *Lindsay et al.* (1876), 93 U. S. 143.

Philadelphia. ERNEST WATTS.

ABSTRACTS OF RECENT DECISIONS.

BILLS AND NOTES.

Alteration of note under seal, where no rate of interest is expressed and the legal rate is seven per cent, by an *addendum* placed on the lower end of the paper, after its execution and delivery, and not incorporated in the body of the note, reciting that "the above note is to be accounted for with interest at eight per cent, per annum," which *addendum* is signed by the principal, but not by his surety, discharges the latter from all liability; such *addendum* is not a new contract of the principal alone, but constitutes a material alteration of the original note. *Sanders* v. *Bagwell*, S. Ct. S. C., March 6, 1890.

CONSTITUTIONAL LAW.

Peddling without a license cannot be forbidden by a State statute to citizens of another State; such prohibition is an interference with interstate commerce. *Wrought Iron Range Co.* v. *Johnson*, S. Ct. Ga., April 4, 1890.